

No, the Spanish Constitutional Court has not endorsed migrant push-backs in Ceuta and Melilla

Carlos Oviedo Moreno

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Since late November, [Spanish media](#) have been discussing a [press release](#) by the Spanish Constitutional Court (SCC) which summarized a long-awaited judgement on migrant push-backs or “*devoluciones en caliente*” at the Spanish enclaves bordering on Morocco. These push-backs are controversial, to say the least. It was all the more shocking that [consensus](#) among news media was that the SCC seemed to have endorsed the practice.

In the meantime, the [judgement](#) has been published in its entirety. While media rushed to cover the press release summary, and reports were not wholly accurate, the actual judgement is flawed by internal contradictions. There is a gap between the theoretical respect for fundamental rights, and their effective protection.

The appeal before the SCC: the context of “devoluciones en caliente”

The judgement addresses, among other issues, a provision in the Organic Law 4/2015 on Citizen's Security, which states that “*aliens being detected at the border line of Ceuta or Melilla while trying to surpass the border elements in order to illegally cross the border shall be rejected with the aim of avoiding their illegal entry in Spain*”. From the beginning, the law has been highly contested by political parties, [civil society](#) and [NGOs](#), due to its collision with several fundamental rights. In May 2015, several Spanish MPs of different political parties (including from PSOE and some groups currently within *Unidas Podemos*, both making up the Spanish coalition government) [brought](#) this provision (as well as several others) before the SCC.

The practice that this provision tried to regulate is well-known: push-backs or “*devoluciones en caliente*”. An act by law enforcement averting crossings of the border between Spain and Morocco – characterized by heavily-guarded tall fences. This “preventative” measure is based on physical coercion of persons on the verge of jumping, actually jumping or who have just jumped one of the most fortified borders in the world. Over the years, there has been considerable evidence of [police violence](#), on people staying [on the fence for hours](#), on [injuries](#), and even on [reported deaths](#). All these acts tend to conclude with the same result: a gate is opened in the fence and persons are immediately handed over to the Moroccan authorities. End of the intervention.

What the SCC says about push-backs

The judgement upholds the appealed provision, and confirms that it is in accordance with the Spanish Constitution. However, the reasoning is internally inconsistent.

On one hand, the SCC states that Ceuta and Melilla constitute a singular situation, being the only EU/Schengen external border in Africa (page 78). This situation allows for specific provisions regulating border crossings into these enclaves. Regrettably, the SCC also refers to “risk situations” and “migration pressure” (page 71), in a nod to extra-legal circumstances often considered when courts deal with migration policies.

The SCC refers to the decision issued on appeal by the European Court of Human Rights (ECtHR) in [N.D and N.T.](#), in February 2020. This judgement ruled on an appeal in a procedure initiated by two applicants who had been pushed back to Morocco, while attempting to cross the border with Spain. The ECtHR overturned its previous decision in first instance and declared that Spain had not infringed the right to an effective remedy (Article 13 ECHR) in conjunction with the prohibition of collective expulsion (Article 4 of Protocol no. 4 ECHR), nor the latter prohibition itself. The ECtHR judgement, a controversial ‘[painful slap](#)’ (widely discussed, for instance [here](#) and [here](#)), blamed the applicants for choosing to not make recourse of the available legal pathways to enter Spain. Moreover, the decision gave weight to the fact that the applicants had “stormed” the fence.

According to the SCC, it is not necessary that individuals trying to cross illegally into Spain act violently or in a huge group, as Strasbourg suggested, in order for law enforcement to be allowed to enforce the ‘rejection at the border’ provision. Consequently, the SCC tolerates law enforcement interventions toward any individual illegal crossing of the border at Ceuta and Melilla (page 78).

On the other hand, the SCC stresses certain often-neglected basic issues. No matter the status of a person, everybody holds certain fundamental rights arising from their human dignity (page 74), which applies everywhere (page 76). This includes the right to access to legal remedies and, by extension, free legal assistance (page 73). The right to seek asylum, and any intervention at the border, must be shaped in accordance with those and other fundamental rights (page 75), as well with reference to international law.

The main reason why the SCC has upheld the controversial provision is to allow law enforcement to act “on the spot” to prevent an illegal crossing. However, these interventions must comply with fundamental rights, including the right to access to legal remedies, the right to a fair trial, to be heard, and the right to free legal assistance (when applicable). The application of those fundamental rights and guarantees entails a duty for law enforcement to watch out for persons in an apparent vulnerable situation (e.g. minors, aged people, and pregnant women – page 80).

What the SCC judgement fails to acknowledge

The judgement includes a [dissenting opinion](#) by Judge Balaguer Callejón who considers that the appealed provision is not lawful. It agrees with the reasoning of the judgement, but considers that the outcome should have been declaring the provision contrary to the Spanish Constitution. And, indeed, this is a natural conclusion.

The SCC decision presents some logical inconsistencies. The Court allows rejections at the Ceuta and Melilla borders only as long as they comply with fundamental rights and guarantees. An instant law enforcement intervention, immediately pushing someone back to Morocco, cannot possibly meet these criteria. Where is the vulnerability assessment of circumstances which are not visible, all the less when looking to someone on the top of a fence from the ground? Where is the legal assistance and the required presence of an interpreter when opening the gate and handing those persons over to the Moroccan authorities? Which are the legal remedies by which those persons can contest the “decision” and seek judicial review?

Therefore, the SCC’s judgement does not connect the dots, because it does not clearly state that immediately returning a person to the other side of a border they are trying to cross is illegal under all circumstances. There is a clear conflict between the SCC’s statements that certain principles prevail and must apply at all times and places, and the judgement’s lack of express acknowledgement that this cannot possibly take place on a fence. Instead, the SCC leaves the conclusion that the current border practices are not lawful to the Spanish government.

The decision is disconnected from reality: stating that human rights apply to everyone, migrants crossing borders included, is not the same as protecting the upheld rights in practice. The SCC’s extension of the February 2020 ECtHR decision to situations not covered by the Strasbourg decision – that is to any illegal border crossing regardless the circumstances – is reprehensible. Equally reprehensible is the reference to the existence of alternative legal avenues to apply for asylum at the Moroccan-Spanish border, which the SCC states must be “real and effective” (page 81), without assessing whether this is the case in reality (and which has repeatedly been [evidenced as false](#)).

Conclusion: the SCC does not allow push-backs but still fails to face reality at the border

The judgment has considered the appealed provision in abstract, and the SCC caveats that the provision must be applied on a case-by-case basis, according to the principles and limits set out in the judgement (page 79). However, such a compliant application is irreconcilable with the instant intervention that the appealed and upheld provision regulates.

Although implicit, the SCC condemns the practice of the Spanish governments over the years in Ceuta and Melilla. Despite inexplicably upholding the legal provision, Spain cannot immediately push-back anyone trying to enter the country because it would not respect their fundamental rights as required by the SCC.

It is now time for the Spanish government to adjust law enforcement interventions at the border according to the SCC judgement. The official reaction of the Spanish Government has been that they will keep carrying on with returns “[in accordance with the law](#)”, which is an insufficient statement as the legal provision has been upheld, but the police practices condemned. The fact that most of the MPs who appealed the provision belong to political parties now part of the coalition government makes this issue unlikely to go any further in litigation. Nevertheless, it reveals that political will to end this practice once existed. Whether such will still exists or not, it is now a matter of complying with national and international law. Spain must uphold human rights at the border and [end push-backs once and for all](#), no matter how they are called.

